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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1255

UNITED STATES OF AMERICA,

Petitioner,

v.

CHARLES J. ASH, JR.,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The majority and dissenting opinions of the court of appeals are reported at 461 F.2d 92.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1972 (Pet. App. C).[1] The petition for a writ of certiorari was filed on March 31, 1972, and was granted on June 12, 1972 (App. 133). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Fifth Amendment, the out-of-court identification of respondent was so impermissibly suggestive and unreliable as to constitute a violation of due process.

2. Whether, under the Sixth Amendment, a defendant in a criminal case is entitled to the presence of counsel at any type of pretrial identification, photographic as well as corporeal.

STATEMENT

Respondent, Charles J. Ash, Jr., and one John L. Bailey were indicted on April 1, 1966, in the United States District Court for the District of Columbia for bank robbery under 18 U.S.C. 2113(a) and 22 D.C. Code 2901 (App. 1). The trial began on May 8, 1968, two years and nine months after the robbery (App. 7). Mr. Ash was convicted on all counts, and on June 21, 1968, was sentenced to a term of 80 months to 20 years (App. 8).[2] Mr. Bailey was acquitted on all counts.

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[1] "App." refers to the printed appendix in this Court. "Pet. App." refers to the appendix of the Government's petition for a writ of certiorari.

[2] He was sentenced to 80 months to 20 years on Counts 1 and 4 of the indictment and 5 to 15 years on Counts 2, 3 and 5, the sentences to run concurrently but consecutively with any other previously imposed sentence (App. 8).

On August 21, 1968, Mr. Ash was granted leave to appeal *in forma pauperis* to the United States Court of Appeals for the District of Columbia Circuit (App. 8). The conviction was reversed on March 1, 1972, by that court, sitting *en banc* and remanded to the District Court for new trial (Pet. App. 1a-85a). The Government petitioned for a writ of certiorari on March 31, 1972. Mr. Ash *pro se* filed a brief statement in opposition and seeking appointment of counsel. The petition was granted on June 12, 1972. Present counsel was appointed by this Court on June 27, 1972.

1. There is no dispute as to the facts of the bank robbery: a young Negro male came into the bank at about 10:15 a.m. on August 26, 1965, placed a woman's stocking as a mask over most of his face, waved a gun and ordered everyone not to move. Several seconds later another figure, also wearing a stocking mask, came running through the lobby and then behind the tellers' cages, seized some money, and ran out. The gunman followed. The entire occurrence lasted three or four minutes (App. 78-79, 85-86, 89, 91-92, 97-98). The dispute is as to whether the respondent, Charles J. Ash, Jr., was the gunman in the robbery.

The evidence upon which Mr. Ash was convicted consisted solely of the testimony by an informer, Clarence McFarland,[3] and the identification of Mr. Ash

[3]Mr. McFarland at that time was serving a sentence for bank robbery, and was awaiting grand jury action on five offenses, including one to which he had confessed. An Assistant United States Attorney had agreed to testify before the parole board on Mr. McFarland's behalf, had arranged to have Mr. McFarland transferred from the District of Columbia Jail to one in Rockville, Maryland, and had helped Mrs. McFarland move to an apartment closer to the school that the McFarland children were to attend (Pet. App. 8a). Mr. McFarland testified generally that Mr. Ash had

by four witnesses to the robbery. The issues before this Court concern the trial court's action in admitting over objection evidence of an out-of-court identification of Mr. Ash by the witnesses to the robbery. This identification occurred after the indictment, while Mr. Ash had counsel, on the day before and the morning of the first day of trial.

2. Counsel objected to the use as evidence of the pre trial photographic identification on the ground that it was made in violation of Mr. Ash's Fifth Amendment and Sixth Amendment rights as set forth in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Wade v. United States*, 388 U.S. 218 (1967). Moreover, objection was made to any in-court identification on the ground that it lacked a basis independent of the constitutionally excluded evidence (App. 10, 36-41, 127-28, 130). The trial held a "Stovall" hearing out of the presence of the jury. The disputed evidence was admitted (App. 63-64, 130-31).[4]

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asked him to help rob the bank and that after the robbery had told him that he and Mr. Bailey had perpetrated the robbery (Pet. App. 7a-8a).

[4] Judge Wilkey, dissenting in the court below, stated that "there was *never* an objection, explicit or implicit, by Ash's counsel to the admission of all five photographs" (Pet. App. 65a). The majority, of course, found otherwise (Pet. App. 6a-7a). While Judge Wilkey is correct that the discussion is jumbled (App. 127-31), one thing stands out: Mr. Ash's trial counsel time and again objected to the admission of Mr. Ash's picture either in conjunction solely with the picture of Mr. Bailey or with all of the other four. For example, when the prosecuting attorney first suggested that Mr. Ash's photograph should go into evidence, his trial counsel stated "I will object to that" (App. 127). Then when the prosecutor went on: "as a matter of fact, I think they should all go into evidence." Mr. Bailey's attorney replied: "I have no objection to that at all. Mr. Rosen, [Mr. Ash's trial counsel] of course, does." (App. 128). Again, when the prosecutor stated: "I think they all should come

3. There were four witnesses who testified concerning the persons involved in the robbery. Two, Mrs. Paugh and Mrs. Major, were bank tellers (App. 78, 84-85). One, Mr. Taylor, was a customer in the bank (App. 91, 94-95). The fourth, Mrs. Apple, was sitting in an automobile around the corner from the bank entrance and observed briefly two men running past her automobile (App. 97-98).

Mrs. Paugh testified at trial that the time-span of the robbery, which took place almost three years earlier, was approximately three minutes. During this time she looked constantly at the gunman who wore a woman's stocking as a mask over most of his face (App. 81). She could make out no features on his face, being able to determine only that he was tall and thin (App. 82). This comported with the description she gave to the police of "a young man about 19 years of age who was about 6 feet tall, Negro, male, light-skinned" (App. 60).

Mrs. Major testified that she looked at the gunman most of the time during the robbery (App. 86), but that, because of the stocking over most of the face, she could not make out his face (App. 89). Thus, she could note that the gunman was a "light-skinned Negro," "about six feet," and "slender" (App. 89).

Mr. Taylor, the bank customer, stated that, as he transacted his business with a bankteller, the bank door opened. Mr. Taylor "glanced instinctively" at the door and saw a man come in and then resumed his conversation. Mr. Taylor thus glanced at the gunman for a "few seconds" prior to his putting on his mask. In this

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in," Mr. Rosen replied: "I would object to Mr. Ash's picture." (App. 128). And, of course, Mr. Rosen earlier in the trial had argued against the admission of any of the out-of-court identification evidence. (App. 36-41).

period, Mr. Taylor did not fully make out the man's features, but believed that he had a mustache and did not wear glasses (App. 91-92, 95). Mrs. Apple was seated in a car around the corner from the door to the bank, waiting for her husband (App. 98). Her car had tinted glass which she agreed reflects the sun and distorts the vision (App. 111). She had a "fleeting glimpse" of a man running around the corner with a bag (App. 109). She then saw a second man running around the corner—"less than five minutes" later (App. 109). She saw the full face of neither man (App. 109). In her "fleeting glimpse" she saw only a profile, noting no distinguishing marks, scars, mustaches, or glasses (App. 110). She described them as being of about the same height (around 5 feet 8 inches) and weight (170 to 180 pounds) and "not too dark complected" (App. 67, 111).

Based upon descriptions given them by these witnesses, the police dispatched a lookout that described the gunman only in terms of height, weight, and general appearance, rather than of facial description. It called for a "Negro male, 19, six foot, 165, thin build" (App. 15, 22).

At least five months after the robbery, in January and February 1966, an FBI agent and a District of Columbia policeman showed to the four witnesses five black and white photographs of Negro males, including ones of Mr. Ash and Mr. Bailey (App. 11-12). These photographs were solely "mug shots of the face[s]" of the Negro males, thus giving no indication of the height of the subjects (App. 12, 14). The witnesses selected Mr. Ash's photograph as a likely suspect. Mrs. Apple stated that "she wasn't sure" Mr. Ash's photo "looked like" the man in the bank. Mr. Taylor said he believed it was he, but he said that he could be more sure "if he could see him in person" (App. 11-13).

The 1966 photo identification was never related to the jury,[5] either in oral description or through the photographs themselves. The jury, however, was told of the subsequent, 1968, photo identification (App. 130).

This 1968 photo identification occurred on May 7 and 8, the day before trial and the first day of trial. At that time the four witnesses were asked to look at five photographs for the purpose of possible identification. This time the photographs were in color. The photographs were shown to the witnesses by the prosecutor and an F.B.I. agent. As before, Mr. Ash's counsel was not present. Of these five pictures only those of Mr. Ash and Mr. Bailey were full length. The other three were only half-body length, that is, from the waist up. Only the pictures of Mr. Ash and Mr. Bailey contained a "height marker or some sort of pole" next to the subject. The others did not. Only the pictures of Mr. Ash and Mr. Bailey contained police identification numbers; the others did not (App. 29-33). Again, only uncertain identifications were made of Mr. Ash; no identification was made of Mr. Bailey (App. 33). Mrs. Paugh and Mrs. Major, who had seen the gunman only with his stocking mask and Mrs. Apple who had received a "fleeting glimpse" of him without the mask, chose Mr. Ash's picture as that of the person each thought or believed to have been the gunman, but without any certainty (App. 33-34). Mr. Taylor, who had seen the gunman without the mask, stated, "I am sorry, I am not certain" (App. 31).

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[5]The jury was advised that a photograph of Mr. Bailey was shown to Mrs. Apple, but was not advised whether she had been shown a photograph of Mr. Ash at that time (App. 120-24).

At trial, Mrs. Paugh, upon being asked four times by the prosecutor to make a definite identification of Mr. Ash, at first stated that she could not "be sure" if the gunman were in the courtroom, then that she could "not definitely" identify him in the courtroom, and finally that Mr. Ash "looks similar" to the gunman (App. 79-80).

Mrs. Major testified that, while she "believe[d]" that Mr. Ash was the gunman, she could not say so "with absolute certainty" (App. 87, 89-90).

Mr. Taylor testified at trial that Mr. Ash "looks like" the gunman but he could not "be certain" (App. 96).

Mrs. Apple was the only one of the witnesses who made a certain identification of Mr. Ash as one of the men who had run around the corner of the bank and of whom she had obtained a "fleeting glimpse" (App. 98-99, 110).

Mr. Ash has been incarcerated since November 9, 1965. Except for two periods of confinement in St. Elizabeth's Hospital for mental examination, he was constantly at the District of Columbia Jail from November 9, 1965, until after the trial terminated and he was sentenced in June 1968.[6] Yet, at no time was Mr. Ash placed in a lineup for in-person identification by the four witnesses to the bank robbery.

5. Upon appeal, respondent Ash raised again the denial of his Fifth and Sixth Amendment rights by the admission of evidence concerning the out-of-court photographic identification. He also urged that the in-court identification should have been excluded as being tainted

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[6]Counsel has received this information from the records of the District of Columbia Jail as read to him by Officer Luther McKenney of the Records Office of that Jail.

by the photographic identification. Finally, respondent urged that his Sixth Amendment rights to a speedy trial were denied.

The Court of Appeals, *en banc*, by a 5-4 vote, reversed, holding that the out-of-court photographic identification, occurring after indictment and without the presence of respondent's counsel, should have been excluded under this Court's rulings in *Wade v. United States*, 388 U.S. 218 (1967), and *Kirby v. Illinois*, 406 U.S. 682 (1972). The court therefore did not decide the Fifth Amendment issue based on *Stovall v. Denno*, 388 U.S. 293 (1967), and *Simmons v. United States*, 390 U.S. 377 (1968), concerning the admissibility of evidence of the photographic identification.[7] Having ordered a new trial, the Court of Appeals also found no reason to decide the propriety of the in-court identification, but referred that issue to the District Court for a determination in light of the evidence to be there submitted—although the court stated that upon the evidence then before the court "we doubt that we could sustain a finding of independent source" (Pet. App. 25a). Finally, the appellate court reserved the decision on the speedy trial issue to the trial court (Pet. App. 26a).

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[7]Although the court below did not rule upon the *Stovall-Simmons* issue, it concluded that "there are at the very least strong elements of suggestiveness in this color photo confrontation." (App. 9a.) The court also concluded that "Certainly the elements of suggestiveness were strong enough so that it cannot be assumed that there was no undue suggestiveness in the absence of explicit findings by the trial court." (App. 10a.) The appellate court directed the trial court, should there be a new trial upon remand, to make findings considering suggestiveness in ruling as to whether an independent source existed for the in-court identification (App. 25a-26a).

SUMMARY OF ARGUMENT

The respondent was brought to trial in 1968 on the charge of being a gunman in a 1965 bank robbery. The case against him consisted to a large extent of identification evidence. This evidence consisted of testimony that respondent had been identified in a May 1968 photo identification procedure and in-court identification of the respondent as the robbery gunman. Respondent urges that the court below correctly ruled that evidence of the 1968 photo identification could not be admitted into evidence at respondent's trial.

A. The 1968 identification procedure was so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to constitute a denial of due process in violation of the standards laid down by the Court in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Simmons v. United States*, 390 U.S. 377 (1968).

The likelihood of misidentification was ensured by these factors: At two separate stages respondent was identified by means of the less reliable and more suggestive photo identification procedure when at both stages he was available for a less hazardous corporeal identification. The opportunity of the witnesses to observe the robbers at the crime scene was scant, fleeting and blurred. The time-gap between the crime and the photo identifications was great. And the photo viewings, particularly the 1968 viewings, were blatantly suggestive: the respondent's photo was almost twice as large as any other in the array; only respondent and the other trial defendant conformed to the height and build description given by the police after the robbery in question; only the defendants were shown with height markers and police numbers; only the defendants' photos were

full-length. And the prosecuting attorney personally participated in and led this procedure, a year after *Stovall* and two months after *Simmons* were decided.

B. The 1968 identification procedure, coming a year after *United States v. Wade*, 388 U.S. 218 (1967), was post-indictment. And yet no counsel was present for the accused. *Wade*, both in its language and in its rationale, encompasses all identifications producing affirmative evidence of identification. This case clearly demonstrates that the evil to which *Wade* was addressed exists in photo identifications as well as in corporeal identifications, thus confirming the wisdom of *Wade's* broad reach. And the Government in its brief for this Court in *Wade* has agreed that there is no difference. Also, the facts of this case illustrate that photo identifications will be used to circumvent the right to counsel at lineups requirement of *Wade*, if *Wade* is now cut back so as not to apply to photo identifications. Finally, the parade of horribles presented by the Government to distinguish this case from *Wade* and from the Government's own argument in *Wade* are red herrings and have no application here.

ARGUMENT

I.

THE PHOTO IDENTIFICATIONS THE DAY BEFORE AND THE FIRST DAY OF TRIAL ARE SO UNNECESSARILY UNRELIABLE AND IMPERMISSIBLY SUGGESTIVE UNDER THE STANDARD OF *STOVALL* AND *SIMMONS* THAT THEY MUST BE EXCLUDED FROM ADMISSION INTO EVIDENCE IN ORDER TO AVOID THE LIKELIHOOD OF MISIDENTIFICATION.

1. *Introduction.* It is noted that the issue raised in this Argument is not explicitly included within the Government's petition for a writ of certiorari in this case. See Rule 40(d)(2) of this Court. While it may be argued that, since a determination of both this issue and the issue on which the Government petitioned depend upon an analysis of the same facts, one issue is fairly comprised within the other, see pp. 28-30, *infra*, respondent does not rest solely upon such a contention. Rather, the respondent rests as well upon the reasoning of *Pollard v. United States*, 352 U.S. 354, 358-59 (1957). In that case, an indigent party was *pro se* at the petitioning stage, and counsel was appointed after the grant of certiorari. 352 U.S. at 358. Appointed counsel presented at the briefing stage an issue that he would have raised at the certiorari stage. The Court concluded that it could consider the issue, although had counsel been present at the certiorari stage, it might well have refused to do so.

Here, respondent was without counsel when the petition for certiorari was filed; it was only after the grant of certiorari that present counsel was appointed by this Court. Should counsel have been representing respondent at the certiorari stage, he would have urged the present argument in opposition to the grant of

certiorari, or, in the alternative, as an additional issue to be considered upon the grant of certiorari. It is respectfully urged that precluding respondent from now presenting this issue would be a price for indigency that constitutes an impermissible denial to him of equal protection.[8]

2. The dangers involved in eyewitness identification are familiar to those involved in the law. As this Court noted in *Wade*, "the vagaries of eye-witness identification are well-known; the annals of criminal law are rife with instances of mistaken identification," 388 U.S. at 228, referring to and quoting from Mr. Justice Frankfurter's observations in *The Case of Sacco and Vanzetti* 30 (1927), and other authorities. The Court noted too that "identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial" *Ibid.*

This Court pointed out as well that "a major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree

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[8] As Argument I constitutes merely an additional ground on which respondent urges an affirmance of the ruling of the court below that the out-of-court identification be excluded from evidence, counsel does not believe that additional relief is sought, necessitating a cross-petition for a writ of certiorari. See *Mulling v. General Industries*, 330 U.S. 545, 547 (1947); *Langnes v. Green*, 282 U.S. 531 533 (1931); *Public Serv. Comm'n v. Havemeyer*, 296 U.S. 506, 509 (1936). Should this Court disagree, however, counsel respectfully urges that this Brief be considered such a cross-petition as well. At least in criminal cases, the time limit on cross-petitions for certiorari is not jurisdictional. *Taglianetti v. United States*, 394 U.S. 316, n. 1 (1969); *Brotherhood of Ry. Clerks v. Florida E. Coast Ry.*, 382 U.S. 1008, 384 U.S. 238, 243 (1966); *Pierson v. Ray*, 384 U.S. 938 (1966), 386 U.S. 547, 551 (1967).

of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pre-trial identification." *Id.* And, as the Court stated most recently in *Kirby v. Illinois*, because of these factors, "The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification." 406 U.S. 682, 691 (1972).

This is certainly not to say that eyewitness identification is never admissible. As the court below has made clear, "procedure for prompt identification of a suspect apprehended immediately after the offense is sound as a general procedure. . . ." *Wise v. United States*, 127 U.S. App. D.C. 279, 282, 383 F.2d 206, 209 (1967). And *Kirby v. Illinois*, 406 U.S. at 691, recently declared, the balance between these two interests—that of protecting the suspect "from prejudicial procedures" involved in eyewitness identifications and that which recognizes the "interest of society in the prompt and purposeful investigation of an unsolved crime"—has been struck by this Court in *Stovall v. Denno*, 388 U.S. 293 (1967). There, the Court set forth the standard that a trial court must suppress evidence of a confrontation which was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the suspect] was denied due process of law." And this determination depends upon "the totality of circumstances surrounding" the confrontation in the particular case. 388 U.S. at 302. The *Stovall* test does "not erect a due process barrier against all unreliable identification;" rather it requires exclusion of evidence which is "unnecessarily" unreliable, that is, as the court below has explained in another case, "evidence which could and should have been obtained by procedures less conducive to unreliability." *Russell v. United States*, 133 U.S. App.

D.C. 77, 82, 408 F.2d 1280, 1285, *cert. den.*, 395 U.S. 928 (1969).

This Court considered these principles in terms of pretrial photographic identification in *Simmons v. United States*, 390 U.S. 377 (1968). There the Court had before it a photographic identification on the day following the commission of the crime, 390 U.S. at 382. The Court, speaking through Mr. Justice Harlan, reiterated the *Stovall* standard, explicitly applying it to the photographic identification. The Court held that "eyewitness identification at trial following a pretrial identification by photograph"—and necessarily evidence of the pretrial identification by photograph itself—is inadmissible if it be "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 390 U.S. at 384. "[E]ach case," of course, "must be considered on its own facts . . ." *Ibid.* The Court went on to discuss those factual elements that should go into this consideration.

First, the Court looked at the necessity of photographic identification, noting that "corporeal identification . . . is normally more accurate."[9] 390 U.S.

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[9]Mr. Justice Harlan cited P. Wall, Eye-Witness Identification in Criminal Cases 83 (1965), where it is stated:

> Where there is more than one eye-witness who will be called upon to attempt an identification, two additional rules should be followed, each based upon a different consideration. The first rule, dictated by the principle that a properly obtained corporeal identification is more reliable than a properly obtained photographic identification, is that only one of the witnesses should be asked to view the photographs. If an identification is made, the person whose photograph is picked out may be arrested on the strength of the identification, and placed in a line-up for the benefit of the other witnesses, who have seen no photographs. This is the

at 384-85, 386 n. 6. In evaluating the necessity of photographic identification, the Court focused upon whether the perpetrators were still at large, the clues were otherwise inconclusive, and the need to determine "swiftly" how to deploy the investigative and arresting forces. 390 U.S. at 384-85.

Secondly, the Court looked at the photo identification procedure itself, to determine how much of a chance of misidentification existed. Focus was played upon the opportunity the witnesses had to observe at the crime itself, the time-span between the observation at the crime scene and the photo identification, the number of photographs shown to the witnesses, and any occurrence at the identification by which the photograph of the suspect is singled out from the others before the witness. 390 U.S. at 383, 385.

Finally, the Court looked at the results of the photo identification, focusing upon the positiveness of the witnesses' response both at the photo identification and later at trial. 390 U.S. at 385.

The Court pointed out the truism that "improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals." 390 U.S. at 383. Photographic identification at best is only second

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usual procedure followed in England.[57] Similarly, all the witnesses may be shown photographs, with no two witnesses being allowed to see the same ones. When any one witness makes an identification, the viewing of photographs ceases, and the suspect is picked up and brought in for a properly conducted corporeal identification. In either case, of course, the witness who made the photographic identification will be asked to view the line-up.

[57] Williams, *supra* note 14, [Identification Parades [1955] Crim. L. Rev. 525] at 530-31. See also Mill, The Scottish Police 95 (1944), quoted in Rolph, Personal Identity 107-08 (1957).

best to "corporeal identification"—the lineup. But the dangers inherent in photographic identification are heightened where the witness did not have a good opportunity to view the suspect at the scene of the crime. And it will be increased where the police are not scrupulously careful at the identification to avoid suggestiveness. The danger, of course, lies not only in the misidentification itself, but in the fact that "the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." 390 U.S. at 383-84. Yet, there is a certain necessity for photo identification, in "apprehending offenders and [in] sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs." 390 U.S. at 384. The difficulty is to balance the necessity with the danger. That balance has been struck by the *Stovall* standard and by a careful weighing of the factual elements isolated in *Simmons*.

A comparison of the *Simmons* elements with those in the present case, it is submitted, demonstrate that the trial court erroneously admitted both the evidence of the photo identification and the in-court identification itself. Indeed, a comparison of the instant case with *Simmons* demonstrates that the only point of identity between them is that each involved a bank robbery.

A. No necessity for the use of photographs in the identification process existed in this case.

A crucial fact in this case is that, at the time that the investigation of the bank robbery focused upon Mr. Ash, he was in the custody of the police. The records of the District of Columbia Jail show that Mr. Ash was arrested

on November 9, 1965, and was constantly incarcerated by the District of Columbia police during the entire time from that date until trial in this case, and indeed is still incarcerated.[10] The first photo identification occurred in January and February 1966. The second photo identification occurred in May 1968. There was on either occasion no reason to settle for second best.[11] A corporeal identification in the form of a line-up was not only possible but was also convenient to the police.

These facts should be compared with those in *Simmons*. In *Simmons*, Mr. Justice Harlan pointed out that the perpetrators of the serious felony were "still at large." 390 U.S. at 384. Here, Mr. Ash was in custody of the police in the very city in which the identification procedure was to occur. In *Simmons* prompt action was necessary to confirm the then inconclusive clues so that police forces could be swiftly and properly deployed not only within the city but perhaps even in other cities to apprehend the suspect should the clues be confirmed. 390 U.S. at 385. Here, Mr. Ash was safely incarcerated mere city blocks away from both the courthouse and the scene of the crime. In *Simmons*, the police could have been concerned with confirming their clues promptly so as to avoid bestowing upon "innocent suspects the

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[10] See note 6, *supra* at p. 8.

[11] At most, it may be argued that a photo identification procedure was proper for one or two of the witnesses in 1966, that is, before the investigation already focused on Mr. Ash, if that be the case. This is to ignore, however, that Mr. Ash was then in the custody of the police and easily available for the corporeal identification. Even such an argument furnishes no justification for a photo identification procedure for the remaining witnesses in 1966 or of any of the witnesses in 1968. See Wall, quoted note 9, *supra*, pp. 15-16.

ignominy of arrest." 390 U.S. at 384. This factor was also emphasized in *Stovall*. 388 U.S. 293, 302. Here there was no danger of an innocent person being arrested. Mr. Ash was already incarcerated.[12]

Thus, here, unlike *Simmons*, there was no necessity for settling for second best. No purpose was served by by-passing a lineup and incurring the admittedly higher risk of misidentification that photo identification involves.[13]

B. The photo-identification procedure was such as to lead to a high probability of mis-identification.

When one examines this case in light of the factors that Mr. Justice Harlan considered important in weighing of a likelihood of misidentification, it is clear that the

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[12] Counsel has been advised that there is no record of Mr. Bailey being in custody at the time of the 1966 photo identification, but that he was in custody during the May 1968 photo identification. Counsel has been advised by Mrs. Payne of the Records Office of the Lorton Reformatory that the records of Lorton reflect that Mr. Bailey has been incarcerated continuously since March 7, 1968, on a conviction prior to the instant case. Although it is possible that Mr. Bailey may not have been available for a corporeal identification in January and February 1966, this would not have prevented a corporeal identification of Mr. Ash at that time; nor was there any necessity for a second-best identification procedure for either man in May 1968.

[13] A comparison with the facts in *Stovall* is also instructive. There, the witness was in a hospital bed awaiting major surgery to save her life. 388 U.S. at 295. She could not go to the jail for a lineup and no one knew how long she might live. 388 U.S. at 302. Thus, the Court concluded, an "immediate hospital confrontation was imperative" and could be countenanced. *Ibid.* Instructive as well is a comparison with the facts in *Kirby*.

identification of Mr. Ash as the bank-robbery gunman is highly suspect. In *Simmons* the Court focused upon four factors that are here crucial.

1. *Opportunity of witnesses to observe at the crime itself.* In *Simmons*, the robbery took place in broad daylight in a well-lighted bank. 390 U.S. at 385. This was so in the instant case as well. But in *Simmons*, the robbers wore no masks and the witnesses had ample opportunity to see "the robber later identified as Simmons for periods ranging up to five minutes." 390 U.S. at 385. Here, the situation was quite different. The two bank tellers, Mrs. Paugh and Mrs. Major, observed the gunman only while he was wearing a stocking mask that covered most of his face coming down over his nose (App. 81, 89). Mrs. Paugh testified that she could not identify any of the man's facial features; all she could tell was that the man was tall and thin (App. 82). Mrs. Major was also in the dark; she too could not make out the man's face; she too knew only that he was tall and slender, though she added that he was a Negro and light-skinned (App. 89). And Mrs. Major had been trained to notice "all the little details" in the event of a robbery and she had written them down immediately (App. 89).

The two other witnesses saw the gunman without his mask. But neither of their opportunities to observe rose to the caliber of that of *Simmons*. Mr. Taylor, a bank customer doing business with a third teller, just turned by "force of habit or instinct" and "glanced" at the door when it opened; he "had a glimpse" of a man and then resumed his conversation with the teller (App. 91, 93, 96). This instinctive glance lasted "just a matter of seconds" (App. 92). Thus, although the man did not then have a mask on, Mr. Taylor could "not fully" make out his features. He believed that the man wore a mustache

and no glasses, but that was all (App. 95-96). The fourth identification witness, Mrs. Apple, was sitting in an automobile that had tinted glass, which, she admitted, while reflecting the sun, distorts a person's appearance (App. 97, 111). As she sat there, Mrs. Apple saw a man run around the corner with a bag in his hand, followed by a second man also at a run (App. 98).[14] She received only a "fleeting glimpse" of the men, and at that only a profile of the right side of their faces; she could discern no distinguishing marks; she did not see whether either had a mustache or wore glasses, for she "didn't get that close a look" (App. 109-11). Indeed, she agreed, she "really couldn't see accurately the face that came towards" her, for she had only "a fleeting second" observation (App. 111-12).[15]

Thus, in sum, there was little opportunity for the crime witnesses to observe the man who held the gun in the robbery. The observations were distorted by a stocking mask or by tinted glass. They were fleeting glimpses and instinctive glances to the side. It is no wonder that none of the witnesses could describe a face

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[14] Mrs. Apple's estimate that five minutes passed between the two men running past her (App. 109) is contrary to the other witnesses' statements that the entire occurrence took from three to five minutes (App. 81, 86).

[15] Judge MacKinnon in dissent in the court below buttressed Mrs. Apple's opportunity to observe with the statement that she had seen "the same two men" ten minutes earlier sitting in a "cream colored Pontiac convertible that was parked in front of her husband's restaurant about a block away from the bank" (Pet. App. 80a). It is true that at first Mrs. Apple stated that "they" were parked in that car (App. 106). But upon being pressed later, she recanted and stated positively that she did not know who the two men in the Pontiac were (App. 114).

and that the police were given only a general picture of height and build and color. This is not *Simmons*. Nor, it is submitted, is it a reliable base on which to build a second-best identification.

2. *The time span between observation and identification.* In *Simmons* the time between the crime at which the witnesses had the opportunity to observe and the showing to them of photographs for the purpose of identification was but a day—as Mr. Justice Harlan said, "while their memories were still fresh." 390 U.S. 385. And in *Stovall* less than two days had passed. 388 U.S. at 295. Here, from the time of the crime in August 1965 until the first photo identification in January and February 1966, five and six months had passed. And from the time of the crime until the second photo identification in May 1968, two and three-quarter years had passed. By no stretch of the imagination could one say that these photo identifications were made "while their memories were still fresh." Indeed, after exhibiting much difficulty in describing the men she saw run past her in August 1965, Mrs. Apple at trial, on May 9, 1968, admitted that her memory had in fact dimmed since the time that she had made her observations (App. 110). And that admission was made just two days after she was asked to identify the fleeing men from the color photographs that were then introduced into evidence (App. 30, 130).

3. *The number of photographs used.* There were at least six photographs displayed to each witness in *Simmons*. Here there were photographs of five men used upon each occasion (App. 11-12, 29, 36). Although this Court indicated unhappiness with the fact that there were only six photographs used in *Simmons*, 390 U.S. at 386 n. 6, there is another factor in *Simmons* that, in contrast,

renders the situation in the instant case even more condemning. The inadequate number of six photographs "consisted primarily of group photographs," which by definition would contain more than one person each. 390 U.S. at 385. Here no group photographs were used. Thus, the procedure used here was not five-sixths as good as that thought to be inadequate in *Simmons*; it was many times worse!

4. *The photo identification itself.* Concerning this factor *Simmons* is left far behind in comparison. The witnesses here could identify no facial features, but only describe build and height and color. Yet, the photographs shown in 1966 were mug shots (App. 12, 14). But that did not approach the suggestiveness of the 1968 showing. Of the five men exhibited in the 1968 group of seven photographs, all were half-body length except those of Mr. Ash and Mr. Bailey, which were full length. And, perhaps to be sure that the point was not missed, Mr. Ash and Mr. Bailey were shown standing next to height markers. To further make the point, the three non-defendants in the photographs are not "thin" nor are they "slender" (the words used by the witnesses to describe the gunman, (App. 82, 89)), but their photographs show a stockiness that could not be described with those adjectives. Indeed, the contrast with the full length photos of Mr. Ash and Mr. Bailey only serves to accentuate the height and thinness of the two accused men. And only the pictures of Mr. Ash and Mr. Bailey contain police identification numbers (App. 33). The Court is respectfully invited to examine those five

photographs, which are included in the Court's file in this case.[16] See App. 33.

In *Simmons* this Court focused heavily on whether the police had done anything to suggest which persons in the pictures were under suspicion. 390 U.S. at 383, 385. It is respectfully submitted that in this case the prosecutor (it is he who handled the 1968 photo identification! (App. 29-30)) could have done no more than perhaps hang signs from each: "I did it!" Witnesses here could identify only height, build, and color. They were shown photographs of five men. Only two were full length. Only two were thin. Only two had height markers. Only two bore identification numbers. And those were the two who were about to go on trial. Moreover, Mr. Ash's photograph was 5" x 7", whereas the next largest was 4" x 5", What more could the prosecutor have done to refresh memories dimmed by so many, many months after such little opportunity to observe?

C. The doubts and lack of positiveness of identification.

The third factor that this Court considered in *Simmons* was the positiveness of the witnesses' response both at the photo identification and at trial. In *Simmons*, "notwithstanding cross-examination, none of the witnesses displayed any doubt about their respective

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[16] For the convenience of the Court, counsel will try to reproduce those photographs as an appendix to this Brief, but at this writing has no knowledge as to how, if at all, they will come out. See p. 1a, *infra*. It should be noted that, although the testimony is clearly in terms of five photographs, there are three photographs of one of the men in the exhibit. Thus, apparently the witnesses were shown photographs of five men, and one of those men was in three pictures. But it is not clear whether all three of those pictures were shown to the witnesses.

identifications of Simmons." 390 U.S. at 385. The picture here is quite different.

Here only one of the four witnesses—the one who received the fleeting glimpse of a profile of running men seen through distorting tinted glass—was positive that Mr. Ash, sitting in the courtroom, was the same man who ran from the bank. Of the others, Mrs. Paugh, when asked by the prosecution to look around the courtroom to see if the gunman was there, replied: "I cannot be sure if he is here." Asked again if she could make an identification, she said, "Not definitely." (App.79.) And when pressed a third time, repeated that "I can make no definite identification," but went on to state: "Other than the fact there is a young man that is here that looks similar to the one in the lobby." (App. 80.) Mrs. Major, when asked whether the gunman at the bank was in the courtroom, replied: "I believe he is." (App. 87.)[17] Mr. Taylor, the fourth witness, could only say that Mr. Ash "looks sort of like the man" in the bank (App. 93). These, it is submitted, are a good deal less than positive identifications; three of the four witnesses were less than certain and displayed doubt—even after having their recollections refreshed a few days before.

And this doubt pervaded the photographic identifications as well. Although the witnesses chose Mr. Ash during the 1966 photo identification, they were not positive (App. 11-12). Indeed, Mr. Taylor, while selecting Mr. Ash's photograph "to the best of his belief," also expressed a desire to see Mr. Ash in person so as to be positive (App. 13). And Mrs. Apple "said she wasn't sure it [the photograph] looked like him [the gunman]"

[17] Mrs. Major later stated: "I have no doubt in my mind, but I cannot say with absolute certainty." (App. 90.)

(App. 13), but that it "could be" him (App. 25). The same was true in 1968. Then neither of the other two witnesses, Mrs. Paugh and Mrs. Major, were certain, but each stated that she thought that the photograph of Mr. Ash was that of the gunman (App. 34).

It is this uncertainty that also distinguishes the facts of this case from that of *Simmons*, and which leads further to a belief that both the photographic identification and the later in-court identification were the result of impermissible suggestiveness.

D. Thus the photographic identification here was impermissive, and this Court should so rule.

1. All out-of-court identifications carry some risk of unreliability and of suggestiveness. The most reliable and the least suggestive of such identifications is the properly conducted lineup. This much is clear. It is also clear that more dangerous forms of out-of-court identification are at times necessary for effective police enforcement. We are thus led to the balancing of the need for less than ideal out-of-court identification with the danger of the particular form employed. The standard of reconciling the competing interests is laid down by *Stovall*, and was most recently reiterated by Mr. Justice Stewart in *Kirby v. Illinois*, 406 U.S. 682, 691 (1972): "The Due Process Clause . . . forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification." This is *a fortiori* true of a photographic identification, which *Simmons* recognizes to be inherently more unreliable and less accurate than the lineup. And this standard is applied by *Simmons* to the photographic identification.

Here, it is submitted, the *Stovall-Simmons* standard requires that the evidence of identification be excluded. There was certainly no necessity for a second-best identification. Mr. Ash was easily found; indeed, he was within the very hands of the police. No manhunt awaited the outcome of a quick identification. No innocent man's arrest would hinge upon its outcome. No witness could not come to such a lineup. So there was no reason not to proceed with a lineup as the most reliable and most accurate method of out-of-court identification. And none has been proffered.

It has been suggested that under such circumstances even the most perfect photographic identification with its inherent dangers could be excluded. See *Russell v. United States*, 133 U.S. App. D.C. 77, 82, 408 F.2d 1280, 1285, cert. den., 395 U.S. 928 (1969), and *cf. Kirby v. Illinois*, 406 U.S. 682, 691 (1972). But this Court need not go so far in this case. Here there is much more. Here the witnesses had scant opportunity to observe the robbers. Here there was a gap in time between the robbery and the photo identification, first of five or six months, and then of almost three years. Here mug shots were shown to witnesses who had described the robbers only in terms of build, height, and color. Here photos were shown that truly pointed the finger at the accused men, that suggested in the most blatant manner whom to choose. The dangers of suggestiveness, which could have been virtually non-existent in this case, began to mount when the police, after focusing upon Mr. Ash as the accused, failed to hold a lineup, even when suggested by a witness. Those dangers climaxed in an overtly prejudicial photo identification the day before and the first day of trial. When one considers that all of these dangers of misidentification were unnecessary, the conclusion that

Mr. Ash was here denied due process is inescapable. The prosecution, having ample opportunity to minimize the likelihood of mistaken identification by furnishing the corporeal identification that at least one witness asked for (App. 13), maximized it instead. It is respectfully submitted that, if *Stovall* and *Simmons* and *Kirby* have any application, it is to this case.[18]

2. It is of course true that the court below did not decide the due process issue. Instead, should there be a new trial, the trial court is to make further findings concerning suggestiveness in connection with a ruling as to the existence of an independent source for a proper in-court identification. Should this Court reverse the holding of the court below that evidence of the out-of-court identification is inadmissible as a violation of *Wade*, its admissibility will still depend upon a determination of the due process issue. Whether or not this Court reverses the holding of the court below, the due process issue is a compelling ingredient of the admissibility of the in-court identification.

It is respectfully submitted that upon this record there is no need to remand to the District Court for findings concerning the existence of suggestivity, whether it was "conducive to irreparable mistaken identification," and whether it was "unnecessarily" so (*Kirby*, 406 U.S. at

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[18] Judge Wilkey, in dissent below, suggests that trial counsel may not have properly preserved his objection to the admission of this evidence (Pet. App. 63a-64a). The majority rejected this suggestion (Pet. App. 7a, n. 6). Respondent does not understand the Petition for Certiorari to have raised nor the Government's brief to have addressed itself to this issue. It should be noted, however, that the pretrial hearing was a *Stovall* hearing going to this very point (App. 10), and that these issues were argued at length (App. 36-41, 127-30).

691), for these elements of the *Stovall-Simmons* test are clearly present. The factual basis of this case is an essential underpinning in the determination of the *Wade* issue (on which the court below decided this case). Compare *Stovall* and *Kirby*. Indeed, as noted several times, Argument II, *infra*, it is just such a factual situation that has compelled this Court to fashion the "*pro se* exclusionary rule" of *Wade*, for it is only such a rule that "can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right[s] . . . ." *Gilbert v. California*, 388 U.S. 263, 273 (1967), recently reiterated in *Kirby*, 406 U.S. at 683. Having analyzed the factual basis of this case for the purpose of resolving the *Wade* issue, brought here by the Government, it is respectfully submitted that this Court should go as well to resolve the *Stovall-Simmons* issue, brought here by respondent. The record, it is submitted, is now complete for such a determination by this Court. See *Pollard v. United States*, 352 U.S. 354, 359 (1957).

Moreover, this Court will not reach a constitutional issue if there be any other ground on which to dispose of the case. See, *e.g.*, *Street v. New York*, 394 U.S. 576 (1969); *Boynton v. Virginia*, 364 U.S. 454 (1960). Respondent urges in Argument II, *infra*, that the court below decided no constitutional issue but rather merely decided the instant case in accordance with the law as established in *Wade*. However, should this Court disagree and consider the issue, as the Government presents it (Brief, p. 2) as a constitutional question to be decided, respondent urges that, since the case can be resolved solely on the application of *Stovall* and *Simmons* to the facts of this case, the Court should determine this issue first so that the constitutional issue may not need to be decided.

Finally, had counsel represented respondent when the petition for certiorari was filed (at which time respondent was *pro se*), counsel would have opposed the grant of the writ on the ground that the ruling of the court below was clearly supportable on the *Stovall-Simmons* ground. Not then having the opportunity so to urge, counsel presents the argument at this time to furnish the Court the opportunity to dismiss the writ as improvidently granted.

II.

APPELLEE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL WHEN EVIDENCE WAS INTRODUCED OF POST-INDICTMENT IDENTIFICATION PROCEEDINGS HELD ON THE EVE OF TRIAL WITHOUT HIS COUNSEL AND WHERE NO PRIOR LINEUP HAD BEEN CONDUCTED.

The Sixth Amendment guarantees to an accused "the right to the Assistance of Counsel for his defense." This Court has stated that this guarantee "encompasses counsel's assistance whenever necessary to assure a meaningful 'defence' ". *United States v. Wade*, 388 U.S. 218, 225 (1967). The Court has found that such a meaningful defense requires counsel's presence in a diversity of situations and settings. *See, e.g., Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment proceedings at which available defenses could be lost if not claimed); *White v. Maryland*, 373 U.S. 59 (1963), and *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearings); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (custodial interrogation). And in *United States v. Wade*, 388 U.S. 219 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), the Court held that the right encompassed lineup

identifications. Although this court has recently limited that right to post-indictment situations, it did nevertheless reaffirm the accused's constitutional right to the presence of counsel at a lineup identification after indictment and hence after judicial proceedings had commenced. *Kirby v. Illinois*, 406 U.S. 682 (1972).

In the instant case, Mr. Ash was effectively denied that right to the assistance of counsel by the Government's unexplained failure to conduct a corporeal identification and the conducting of a photographic identification in its stead.[19] Mr. Ash was in custody in Washington, D.C. at the time of the indictment on the instant charge and indeed during the entire period that the investigation apparently focused upon him as a suspect in the bank robbery. All four of the Government's identification witnesses resided in the District area. Mr. Ash had available counsel long before the 1968 identification.[20] And a photographic identification held five and six months after the event for which Mr. Ash has since been convicted revealed that the witnesses could make only tentative identifications of him. At least one witness suggested seeing the suspect in corporeal form. Yet, despite all these circumstances, the Government conducted no lineup. Instead, on the eve of the trial, 33 months from the time of the crime and 28 months after

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[19] The factual statements in this argument have been fully developed in Argument I, *supra*. Record citations are therefore given only where new facts are developed or for other particular reasons.

[20] Indictment was filed on April 1, 1966. Counsel was appointed for Mr. Ash on April 18, 1966. Mr. Ash had counsel continuously from that date until after termination of trial in May 1968 (App. 1-8).

the first tentative photo identification, the Government showed what, it is submitted, are overtly suggestive pictures of Mr. Ash to the witnesses, in the absence of his counsel, for the purpose of effecting an identification. The less than fully certain identifications made at this highly prejudicial proceeding were then introduced into evidence.[21]

Thus, the issue before this Court is whether, in the circumstances of this case, Mr. Ash was denied the right to the assistance of counsel as that right has been enunciated in *Wade*, *Gilbert*, and *Kirby*. Respondent urges that where, as in the case at bar, a post-indictment identification has occurred in the absence of counsel when the accused was in custody and the witnesses were available, and particularly where no prior lineup had been held, the right to counsel is applicable, no matter how narrowly that right is construed.

We recognize that the majority of the circuits which have ruled on the issue of the right to counsel at photographic identifications have held that the right does not attach to such proceedings. See the cases collected in the Government's brief, pp. 19-20, and in the dissent of the court below (Pet. App. 35a nn. 16, 17). Only the United States Court of Appeals for the District of Columbia Circuit holds to the contrary (the instant case). Two states have agreed. *Commonwealth v. Whiting*, 439 Pa. 205, 266 A.2d 738, cert. den., 400 U.S. 919 (1970); *Thompson v. State*, 85 Nev. 134, 451 P.2d 704 (1969).

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[21] No argument is made here that *Wade* applies to the 1966 photo identification. *Stovall v. Denno*, 388 U.S. 293, 297 (1968); *Kirby v. Illinois*, 406 U.S. 682 (1972). Rather, the issue before this Court in this Argument goes solely to the 1968 photo identification.

However, we also note that, prior to this Court's ruling in *Wade*, only the Fifth Circuit had ruled favorably for the proposition that the right to counsel attached to a corporeal identification proceeding. *United States v. Wade*, 358 F.2d 557 (C.A. 5, 1966). Four other circuits had declined to recognize such a right. *United States v. Evans*, 359 F.2d 776 (C.A. 3) (per curiam), cert. den., 385 U.S. 863, 951 (1966); *United States ex rel. Stovall v. Denno*, 355 F.2d 731 (C.A. 2 1966), affirmed on other grounds, 388 U.S. 293 (1967); *Williams v. United States*, 120 U.S. App. D.C. 244, 345 F.2d 733, cert. den. 382 U.S. 962 (1965); *Caldwell v. United States*, 338 F.2d 385 (C.A. 8, 1964), cert. den., 380 U.S. 984 (1965).

Moreover, this Court has on a number of occasions adopted the minority view. *See, e.g., Kaufman v. United States*, 394 U.S. 217, 220 (1969) (sustaining the position taken by the 4th and 10th Circuits; rejecting the position taken by the 2d, 3d, 5th, 6th, 7th, 9th, and D.C. Circuits); *Simmons v. United States*, 390 U.S. 377, 392 (1968) (sustaining the position of the D.C. Circuit; rejecting that of the 4th, 5th, 7th, 8th, and 10th Circuits); *Putnam v. Commissioner*, 352 U.S. 82, 84 (1956) (sustaining the view of the 8th Circuit; rejecting that of the 3d, 5th, and 6th). Indeed, at least from the time of John Marshall, this Court and its members have not been reticent to hold as law doctrines that had little, if any, support in the then decided cases. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Baker v. Carr*, 369 U.S. 186 (1962).

A. The holding of the United States v. Wade is applicable to photographic identification in the circumstances of this case.

1. *The language and rationale of Wade encompasses post-indictment photographic identification.* Although the specific facts of *Wade* involved a post-indictment lineup proceeding, the language of this Court in *Wade*, the rationale it employed, as well as the evils it sought to dispel, indicate that the holding of *Wade* was not intended to and cannot rationally be confined to corporeal identifications but encompasses other forms of eyewitness identification as well. Thus, the Court declared, in explaining the dangers inherent in eyewitness identification and the concomitant need of the presence of counsel, "there is a serious difficulty in depicting what transpires at lineups *and other forms of identification confrontations.*" 388 U.S. at 230 (emphasis added). Again, the Court, in emphasizing the cause of these dangers, stated, in terms that focus on eyewitness identifications generally rather than on a particular form of such identification: "we assume they [the risks] derive from the dangers inherent in *eyewitness identification* and the suggestibility inherent in the context of pretrial identification." 388 U.S. at 235 (emphasis added). Likewise, Mr. Justice White, in his dissent in *Wade*, confirmed the scope of the Court's holding: "the rule applies to any lineup, *to any other techniques* employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone . . . ." 388 U.S. at 251 (emphasis added). See also *Commonwealth v. Whiting*, 439 Pa. 205, 209, 266 A.2d 738, 740, cert. den., 400 U.S. 919 (1970).

2. *Post-indictment photographic identification proceedings are a critical stage of the adversary system.*

The hallmark of *Wade* was the Court's determination that a post-indictment lineup was a critical stage of the adversary proceedings. 388 U.S. at 237. Although the Court did not delineate the boundaries of "critical stages," it did indicate the type of situations which were not to be construed as critical. Thus, "fingerprints, blood sample, clothing, hair, and the like" are not critical stages within the meaning of *Wade*. 388 U.S. at 227. They are not critical because there is still opportunity at trial through "cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts." 388 U.S. at 227-28. It is instructive to note that this list of pretrial preparatory steps which is explicitly excluded by the Court from the arena of critical stages does not include any form of eyewitness identification—whether it be the lineup specifically condemned in *Wade*, the one-man showup criticized in *Stovall* absent exigent circumstances, or the post-custody photographic identification of the instant case. What separates these forms of eyewitness identification from the preparation stages excluded by *Wade* from the parameters of "critical stage" is the great risk that the absence of counsel "might derogate from his [accused's] right to a fair trial." 388 U.S. at 228. Whereas the admissible evidence concerning "fingerprints, blood sample, clothing, hair, and the like," is the physical, tangible object, which can be produced for the inspection of counsel and tangibly into the courtroom, and perhaps scientific, objective findings concerning the tangible object, the drama of the lineup and of the photographic identification contain much more. Either in corporeal or in photographic form, the identification contains the subjective conclusions of witnesses which can be affected by a myriad of diverse

factors that cannot be reproduced either for the inspection of counsel or for the courtroom. And as the Court said in *Wade*, "cross-examination cannot be viewed as an absolute assurance of accuracy and reliability." 388 U.S. at 235.

The *Wade* Court's paramount concern was with the accuracy of the guilt-determining process. The Court was clearly disturbed by the lack of reliability in the eyewitness identification procedure. The Court, citing extensively from a number of authorities, catalogued the dangers that inhere in such procedure. 388 U.S. at 228-35. It is not necessary here to traverse this all too familiar terrain. It is significant, however, that it was these dangers, and most notably that of the suggestive, improper influence--intentional or unintentional--that occur at eyewitness identification proceedings which caused this Court to deem such proceedings to be critical and thus to require the presence of counsel. Although the specific facts of *Wade* relate to a lineup, the Government has stated it most eloquently: "There is no meaningful difference between a witness' pretrial identification from photographs and a similar identification made at a lineup." Brief for Gov't. at 7, *United States v. Wade*, 388 U.S. 218 (1967). And the Government is absolutely right!

Admittedly the photos used in a photographic identification can be more easily preserved and made available to counsel than can the participants of a lineup. But to argue that a lineup therefore requires the presence of counsel and a photographic identification does not, is to miss the point of *Wade*. For a photograph made of a lineup can also be easily preserved for the inspection of counsel. See *United States v. Brown*, ___ U.S. App. D.C. ___, 461 F.2d 134 (1972). Yet this did not deter this

Court from holding in *Wade* that a lineup is a critical stage requiring counsel. For the Court was mindful of the kinds of suggestive influence that can surround an identification, irrespective of the fairness of the lineup or photo array itself. Thus, preservation of the photos would enable the attorney to consider only one factor of the identification—the array itself. It does not preserve the suggestive or improper influences that may have occurred at the identification proceeding.

A photographic identification is clearly no less critical a stage of the prosecution than is a lineup. In fact, the dangers which the Court found so distressing in the eyewitness identifications at lineups are present *to an even greater extent* at photographic identifications. First, photographic identifications are considered inferior to corporeal identifications and thus even less reliable than lineups. As Wall, *Eyewitness Identification*, cited extensively by this Court in *Wade*, points out: "[T]he use of photographs may have a serious effect upon the reliability of the identification of the suspect as the perpetrator of the crime. . . . [W]here a witness had made a photographic identification of a person, his subsequent corporeal identification of that same person is somewhat impaired in value, and its accuracy must be evaluated in light of the fact that he first saw a photograph. . . . Because of the inherent limitations of photography, which presents its subject in two dimensions rather that the three dimensions of reality, and which presents a "frozen" image, often not too similar to the image of the living, moving subject, . . . a photographic identification, even when properly obtained, is clearly inferior to a properly obtained corporeal identification." *Id.* at 67-70. See also *People v. Gould*, 54 Cal.2d 621, 354 P.2d 870 (1960); *United States v. Collins*, 416 F.2d 696, 701 (C.A.

4, 1969) (Winter, J., dissenting). *United States v. Brown*, ___ U.S. App. D.C. ___, 461 F.2d 134, 150-51 (1972) (Wright, J., dissenting).

In addition to their greater unreliability, photo identification procedures are more critical than corporeal identifications because the defendant is not present to verify the fairness of the proceedings. As the Government argued in its brief in *Wade*, at 24-25, if there is to be overreaching, it is much more likely to occur "when the accused is absent than when he himself is being 'used.'" *See also*, *United States v. Marson*, 408 F.2d 644, 653 (C.A. 4, 1968) (Winter, J., dissenting). [*Thompson v. State*, 85 Nev. 134, 137, 451 P.2d 704, 706 (1969)].

Thus the presence of counsel is even more crucial at the photographic identification than at the lineup.

There is the further danger that, once the witness makes a photo identification, he will be reluctant to retract it. *Wade*, 388 U.S. at 229, *United States v. Collins*, 416 F.2d 696, 701 (C.A. 4, 1969) (Winter, J., dissenting). This Court in *Simmons* recognized just such a danger, explaining that having viewed a picture "the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen" committing the crime. 390 U.S. at 383-84; see also Wall, *Eyewitness Identification*, 68. Indeed, unlike a lineup where the figures are fairly distant and the facial features thus less distinct, the witness' closer study of the photograph allows that image to be etched even more firmly in the witness' mind, and thus is even more likely to replace the original memory that the witness had of the perpetrator of the crime.

Moreover, as this Court noted in Wade, 388 U.S. at 229, the dangers of eyewitness identification are heightened

when the witness' opportunity for observation was insubstantial, thereby making "his susceptibility to suggestion the greatest." This is precisely what occurred in the instant case. Two of the witnesses saw the robber but for a few seconds, and one of those was looking through a distorting tinted glass; the other two viewed him only with a mask covering most of his facial features. The decision in *Wade* was a result of the need to protect just such a suspect from the vagaries and inaccuracies of eyewitness identification. See *Wade*, 388 U.S. at 229; *Gilbert v. California*, 388 U.S. 263, 273 (1972); *Kirby*, 406 U.S. at 683. Yet, at the exact moment when counsel was needed to avert the prejudice of overly suggestive identification—and after this Court had recognized that right in *Wade*—the Government, with the prosecuting attorney in the lead, insured counsel's absence by conducting a photographic rather than a lineup proceeding. Surely if counsel had been present, the prejudice and taint would have been averted. Fundamental fairness to the accused could have been preserved and the interest of judicial economy served.[22]

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[22] It is of more than passing interest that the District of Columbia police reported in December 1971 that, since the Police Department promulgated uniform procedures under *Wade* for conducting police lineups, there had not to that date been a single case dismissed for improper *or suggestive* lineup identification. M.E. Pitts (Deputy Chief, Metropolitan Police Department, Washington, D.C.), "How Sound Is Your Police Lineup," *FBI Law Enforcement Bulletin* (Dec. 1971). And, as this Court well knows from the repeated press releases of the Police Department that have been reported in the press, this has been a period of substantially decreasing crime rates in the District of Columbia.

3. The right to counsel as enunciated in Wade is not contingent upon the presence of the accused.

The only real difference between *Wade* and *Ash* is that in the former the accused was present at the identification while in the latter he was not. However, the right to counsel as guaranteed by this Court in *Wade* was not made contingent upon the physical confrontation of the accused with his accusers. For, unlike *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Escobedo v. Illinois*, 378 U.S. 478 (1964), in which the right to counsel was grounded on the accused's Fifth Amendment right not to incriminate himself, the Court in *Wade* explicitly denied to the accused a Fifth Amendment right not to participate in a lineup. In *Wade*, the accused's Sixth Amendment right was grounded solely on his right to assistance of counsel to protect himself from the unreliability inherent in eyewitness identifications. 388 U.S. at 221-23, 226. Thus, the fact that the accused is present in the lineup but not at the photographic identification proceeding is not significant in determining the parameters of his right to have the assistance of counsel at such a critical juncture of the adversary proceeding. Particularly is this so because the prejudice to the accused results not from his own actions but from the manipulations—intentional or unintentional—of others.

Moreover, since the accused is not complaining of a denial of the constitutional right to be confronted by witnesses against him, the presence or absence of a physical confrontation should make no difference in determining whether the accused is entitled to counsel when his accusers have arranged for an eyewitness identification. See *United States ex rel. Reed v. Anderson*, 461 F.2d 739, 750 (C.A. 3, 1972) (Hastie, J., concurring in part and dissenting in part).

4. The availability of cross-examination is not a satisfactory solution.

The Government contends that the right to cross-examination of those witnesses who are presenting the affirmative evidence of the out-of-court identification is a satisfactory safeguard against the admitted dangers of pretrial identification. The short answer of course is that this was not found to be a satisfactory solution in *Wade*. And an examination of the facts in the case at bar demonstrates that *Wade* was right and that the same reasoning applies to photographic as to corporeal identification.

It is true that in the instant case trial counsel was quite successful in eliciting from the witnesses a good deal of evidence of the suggestiveness of both the 1966 and the 1968 photo identifications. However, it must be noted that the material he had to work with was particularly easy for this purpose: the slight opportunity the witnesses had to observe at the scene of the crime, and their concomitant inability to describe the features of the perpetrators of that crime, the long time span from the observation to the viewing of the pictures, and the suggestiveness of the 1968 photographs themselves. Yet, one must wonder, how much else would be done to "refresh" memories of witnesses by a prosecuting attorney who—a year after *Stovall* and two months after *Simmons*—would not deem it inappropriate to use identification procedures as blatantly suggestive as the five photographs of the 1968 identification. Not that such acts would be done deliberately. Nuances, such as the order in which pictures are presented, the emphasis of voice, the glance, the gesture used, the exact words employed, can be unintentional as, one may believe, were the choice of the five photographs of the May 1968

identification. As one need not postulate bad faith to an eager advocate for the prosecution in the use of these photographs, one also need not assume bad faith in the choice of words, the lighting, the subtleties of which one who is not clearly aware may be guilty.

These are factors behind the *Wade* decision, and they are equally applicable here. How can counsel who was not there explore such matters? Should the prosecuting attorney who here presented the 1968 photographs to the witnesses have been examined under oath concerning his inflections, his facial gestures, his choice of particular words, details of which one may assume he was no more aware than he was of the impropriety, after *Stovall* and *Simmons* (if not before), of using subjects in an identification procedure that so clearly pointed the finger at the persons about to be tried? Should the witnesses have been expected to note all of these subtleties? Should defense counsel have asked each one of them a litany of questions concerning placement of eyebrows, intonation of voice, exact choice of words, and the like?

Nor is it any answer to point to the acquittal of co-defendant Mr. Bailey or to the indecisiveness of most of the identifications of Mr. Ash both at the viewing and in court. These results are just as consistent with the rationale that the witnesses were not as susceptible to the suggestiveness of the 1968 identification as they might have been. One can only wonder how much weaker their identifications would have been without the suggestiveness of which we know and without the suggestiveness of which, due to the absence of counsel, we cannot know!

It is submitted that the facts of this case clearly demonstrate why *Wade* was decided and that *Wade* is right. It was only after *Wade* that the District of Columbia police instituted uniform procedures to ensure

due process for corporeal identifications. The instant case demonstrates an attempt to avoid those strictures. The decision of the court below, applying *Wade* to all identification procedures, will ensure that the same results to which Deputy Police Chief Pitts has testified[23] concerning *some* identification procedures will ensue for *all*.

B. *Wade* does not require counsel in all photographic identifications, as it does not in all corporeal identifications.

The courts have declined to rule that an accused has an absolute Fifth or Sixth Amendment right to a lineup in lieu of a photographic identification. *United States v. Ravich*, 421 F.2d 1196, 1203 (C.A. 2, 1970); *cf. Simmons*. We do not urge a contrary position upon the Court as a constitutional mandate. In the circumstances of this case, it is not necessary for us to do so. Nor is it necessary to urge that this Court rule that the right to counsel at a photo identification must extend to all such identifications. Just as *Wade* does not apply to all corporeal identifications, so also it would not apply to all identifications by photograph. This Court made clear in *Kirby* that the right to counsel does not extend to pre-indictment corporeal identifications, for there the suspect most probably does not yet have counsel, the investigation most probably has not yet focused on one suspect to the exclusion of others, there is still need of speedy investigative and arresting steps (should the identification procedures demonstrate that the person being identified is not the perpetrator of the crime), and

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[23] See note 22, p. 39, *supra*.

the like. Similarly, the right to counsel in photographic identifications need not extend to situations in which the suspect is not readily available, perhaps because he is a fugitive, or where the witnesses are scattered in distant states, or other such exigent circumstances are present. This Court has drawn such distinctions in similar situations. See for example, *Stovall* where the Court noted the dangers of single-suspect corporeal identifications, but countenanced them under the "imperative" circumstances of that case. 388 U.S. at 302. Likewise, in *Simmons*, photo identification, though recognized to be second best and fraught with hazards, could be employed where the perpetrators were at large, the clues were still inconclusive so that arrests could bring ignominy to innocent persons, and it was necessary to determine "swiftly" whether the investigation was progressing "on the right track" so that officials could be properly deployed in Chicago or other cities. 390 U.S. at 384-85.

Regardless of its application to other situations of photographic identification, which of course must await further litigation, this case clearly demonstrates a situation in which *Wade* and *Kirby* apply. At the time of the May 1968 photo identification, the accused had been in custody for almost three years; 25 months had elapsed from the time of the indictment to the time of the identification; counsel had been retained (App. 5-7) and was readily available; at least one witness had indicated a desire to view this defendant in person; a prior photo identification proceeding had indicated that the witnesses' ability to recognize the gunman was highly speculative; no prior lineup had been held. The situation literally cried out for a corporeal identification. Under these circumstances, to fail to conduct such an identification a year after *Wade* and *Stovall* and two

months after *Simmons* could be nothing other than an attempted circumvention of the constitutional rights of the accused as enunciated by this Court in *Wade* and *Kirby*. The Government has come forward with no explanation for the failure to hold a lineup. As the Pennsylvania Supreme Court said in *Whiting*: "*Wade* cannot be undercut simply by substituting pictures for people, nor can the police prepare a witness for the lineup by privately showing the witness pictures of the accused." 439 Pa. at 209, 266 A.2d at 740. See also *United States v. Marson*, 408 F.2d 644, 654 (C.A. 4, 1968) (Winter, J., dissenting).

Indeed, under the facts of this case, holding of a photo identification in lieu of a lineup almost a year after *Wade* was decided, it is submitted, was an apparent subterfuge to avoid this Court's clear and decisive ruling that an accused has a right to counsel at a lineup. And as the prosecutor himself was the instigator (Agent Berry of the FBI testified: "I was accompanying Mr. Sepenuk [the Prosecuting Attorney] and he wished to have the witnesses view the photographs." (App. 32)), one cannot seek to excuse this action on the ground of ignorance of the law on the part of the police. If this Court were to allow such a practice to stand uncorrected, then it will in effect have overturned *sub silentio* its holdings in *Wade* and *Kirby*. It will pave the way for the anomalous situation in which the Government could avoid *Wade* by taking photos of the lineup in the absence of witnesses or of counsel and then showing them to witnesses without the presence of either the accused or his counsel. *United States ex rel. Reed v. Anderson*, 461 F.2d 739, 751 (C.A. 3, 1972) (Hastie, J., concurring in part and dissenting in part). It is unfathomable that this Court would lend its name to such a stratagem.

C. Presence of counsel at a post-indictment photographic identification where no prior lineup has been conducted is not an interference with the Government's preparation of its witnesses for trial.

Where a prior lineup has been held, and the Government uses photographs of the lineup to refresh the memories of its witnesses, no violation of *Wade* occurs. See *United States v. Brown*, ___ U.S. App. D.C. ___, 461 F.2d 134 (1972). Respondent does not ask this Court to fashion a rule to the contrary. However, there is a vast difference between the use of photographs of a lineup to refresh the memory of a witness who had made a positive identification at that lineup and the use of photos, as in the instant case, to effect an identification moments before trial. For the former is truly a refreshing of memory rather than an original production of affirmative evidence.

Moreover, application of the right to counsel in this case would not in any way imply that the accused's counsel should be present at the Government's pretrial preparation of its witnesses. What the witnesses say to the prosecutor at such preparation is *not* admissible into evidence as affirmative proof; but an identification made at such a session, from a lineup or from a photographic array, is admissible to prove the fact of identification. And, as Mr. Justice Harlan speaking for this Court, observed in *Simmons*, such identification can have a profound effect on the in-court identification. 390 U.S. at 383-84.

The rights enunciated in *Wade* and *Kirby* cannot be defeated by such red herrings. For clearly the preparation of the witnesses can be separated from the identification procedures. The safeguarding of the accused's right to counsel in the circumstance of this case will not result in

the presence of the defense attorney at every session held by the prosecutor with his witnesses; the Government's right to prepare its case in private will not be impinged upon.

However, should in a later day the Government's implications be shown to be correct (Brief of Gov't at 25-26, instant case) that photographic identifications are not substantively different from ordinary interviews of witnesses by prosecuting attorneys—as the Government was correct that photographic identifications do not differ in substance from corporeal identifications (Brief of Gov't at 7, *Wade*)—and if the dangers as demonstrated in this case are shown to exist in ordinary pretrial preparation, it will be time enough to consider whether constitutional protection requires counsel's presence in that situation as well. That is not this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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